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No. 87-690

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In the Supreme Court of the United States

OCTOBER TERM, 1987

STEVEN PETRONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that a false statement on a tax return that would not affect the correct computation of the tax cannot relate to a "material matter" within the meaning of 26 U.S.C. 7206(1) and hence that his plea of guilty to that offense should be vacated for lack of a factual basis.

1. Pursuant to a plea agreement, petitioner pleaded guilty to one count of conducting a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848, and four counts of filing false tax returns, in violation of 26 U.S.C. 7206(1). Prior to accepting the guilty pleas, the district court elicited from petitioner the admission that he knew that his tax returns for the years 1981-1984 were not "true" (Pet. App. 2a-3a). The court sentenced petitioner to ten years' imprisonment on the CCE count and fined him $100,000, and the court sentenced petitioner to a total of ten years' imprisonment on the false return counts, to be served consecutively to the CCE sentence (see Pet. 3-4).

The false statements on petitioner's tax returns were that he was employed by P&T Trucking Company and received certain sums from that company as income. In fact, that company was used to "launder" the proceeds of drug transactions, and the sums reported by petitioner as income were amounts that had been transferred by petitioner to P&T to conceal their source and were subsequently repaid by the company. Pet. App. 5a.

Petitioner appealed the judgment of conviction on the ground that the district court had failed to develop a sufficient factual basis for his guilty plea to the false return counts, as required by Fed. R. Crim. P. 11(f). He contended that the false statements on the returns that he had acknowledged were not material because they did not affect the correct computation of his tax. The court of appeals rejected that contention and affirmed the convictions in an unpublished opinion (Pet. App. 1a-5a). The court held that a misstatement on a tax return is material so long as it "has 'the potential for an obstructive or inhibitive effect' " on effective tax enforcement (*id.* at 5a, quoting *United States* v. *Greenberg*, 735 F.2d 29, 31 (2d Cir. 1984)). The court explained that misstatements of the source of income, like those made by petitioner, are material because they "necessarily obstruct the ability of the IRS to verify tax returns" (Pet. App. 5a).

2. Petitioner contends (Pet. 7-9) that a false statement on a tax return can be material only if it affects the correct computation of tax. Petitioner provides no argument in support of this contention other than the bare assertion that the court of appeals' view "confuses what *might* be material with what *is* material" (Pet. 8 (emphasis in original)). This assertion is erroneous, and petitioner's definition of materiality was correctly rejected by the court of appeals.

Section 7206(1) is a perjury statute, not a statute that prohibits tax evasion. It is designed to punish "those who wilfully falsify their returns regardless of the tax consequences of the falsehood." *United States* v. *Lodwick*, 410 F.2d 1202, 1205-1206 (8th Cir.), cert. denied, 396 U.S. 841 (1969) (quoting *Gaunt* v. *United States*, 184 F.2d 284, 288 (1st Cir. 1950), cert. denied, 340 U.S. 917 (1951)). Thus, it is well established that the existence of a tax deficiency is not an element of the crime defined by Section 7206(1). See, *e.g.*, *United States* v. *Johnson*, 558 F.2d 744, 746 (5th Cir. 1977), cert. denied, 434 U.S. 1065 (1978); *United States* v. *Ballard*, 535 F.2d 400, 404 (8th Cir.), cert. denied, 429 U.S. 918 (1976). By the same token, the materiality requirement of the statute does not require that the false statement affect the computation of the defendant's tax liability.

Every court of appeals to consider the question has agreed with the court below that a misstatement on a tax return is material, even if it does not affect the computation of tax, as long as it has the potential to interfere with the ability of the Internal Revenue Service (IRS) to audit returns. See *United States* v. *Holecek*, 739 F.2d 331, 337 (8th Cir. 1984), cert. denied, 469 U.S. 1218 (1985); *United States* v. *Greenberg*, 735 F.2d at 31-32; *United States* v. *Taylor*, 574 F.2d 232, 235-236 (5th Cir.), cert. denied, 439 U.S. 893 (1978); *United States* v. *DiVarco*, 484 F.2d 670, 673 (7th Cir. 1973), cert. denied, 415 U.S. 916 (1974); see also *United States* v. *Romanow*, 509 F.2d 26, 28 (1st Cir. 1975); *United States* v. *Abbas*, 504 F.2d 123, 126 (9th Cir. 1974), cert. denied, 421 U.S. 988 (1975). In particular, as the court stated in *DiVarco*, "[i]n light of the need for accurate information concerning the source of income so that the Internal Revenue Service can police and verify the reporting of individuals and corporations, a misstatement as to the source of income is a material matter" (484 F.2d at 673 (footnote omitted)). Acceptance of petitioner's view

that a misstatement that does not affect the computation of tax liability is not material, even if it would impair the IRS's ability to audit the return, "would seriously jeopardize the effectiveness of section 7206(1) as a perjury statute and would imperil the self-assessment nature of our tax system" (*United States* v. *Taylor*, 574 F.2d at 236).

3. There is no merit to petitioner's assertion (Pet. 7-9) that there is a conflict among the circuits on the definition of materiality in Section 7206(1). No decision has held that a misstatement that does not affect the computation of tax liability is immaterial. Each of the cases cited by petitioner was one in which the Section 7206(1) conviction was affirmed and the misstatement did affect the computation of tax liability. In none of those cases did the court have occasion to consider the question presented here—the materiality of a misstatement that does not affect the computation of tax liability but would impede the IRS's ability to audit the return. The language used by some of those courts in the course of opinions directed at the specific question before them therefore does not indicate how they would rule if actually presented with a misstatement like the one in this case. Indeed, despite the language in *United States* v. *Warden*, 545 F.2d 32, 37 (7th Cir. 1976), upon which petitioner primarily relies (see Pet. 7), the Seventh Circuit in *United States* v. *DiVarco, supra*, has unequivocally held that a misstatement regarding the source of income is material even if it does not affect the computation of tax liability.

4. Relying on *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964), petitioner contends (Pet. 9-11) that his conviction violates due process because it rests on an "unforeseeable and retroactive judicial expansion" of Section 7206(1). This contention is plainly without foundation. Because no court has ever held that petitioner's construction of Section 7206(1) is correct, petitioner could hardly have rea-

sonably relied upon that construction when he submitted the false tax returns; indeed, the fact that petitioner pleaded guilty belies any such reliance. Petitioner's implicit contention that Third Circuit law gave him a basis for believing that his conduct did not violate Section 7206(1) is even weaker. As the court below stated, the Third Circuit has "never held that a misstatement is material only if it results in a miscalculation of tax liability" (Pet. App. 5a), nor is there any language in any Third Circuit opinion that can be construed as lending any support to that proposition.[1] In short, the construction of Section 7206(1) upon which petitioner's conviction rests is the one that has been uniformly adopted by the courts and was not at all "unforeseeable" when petitioner filed the false tax returns.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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[1] The decision upon which petitioner relies, *United States* v. *Graham*, 758 F.2d 879, 886 n.5 (3d Cir.), cert. denied, 474 U.S. 901 (1985), stated that it was not considering the issue of materiality and further noted that, in any event, "it is established that a misstatement on a return is material if * * * it results in an incorrect computation of the tax." That statement does not even slightly suggest that a misstatement *must* affect the computation in order to be material. In any event, it is not apparent how petitioner could have relied upon the 1985 decision in *Graham* when he decided to file false returns for the tax years 1981-1984.

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